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No. 89-1443

In The

Supreme Court of the United States

October Term, 1989

JOHN B. HAWLEY, Individually and as Next Friend for G.P. HAWLEY, a Minor,

Petitioners,

v.

ROY S. KENDALL, SHAUN M. MILLER, EARL F. NEWSOM and THE CITY OF DALLAS, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

1. Whether police officers sued for constitutional violations lose their qualified immunity merely because their conduct allegedly violates a state statute.

2. Whether a city may be held liable for an allegedly unconstitutional policy if no constitutional injury exists.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) and the memorandum order and judgment of the district court (Pet. App. B) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 1989. The petition for a writ of certiorari

was filed on March 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This civil rights case arises out of a routine traffic stop.[1] On September 6, 1985, Petitioner John B. Hawley, accompanied by his then four year and ten month old daughter Petitioner G. P. Hawley, was stopped by two Dallas police officers (Respondents Kendall and Miller) for his failure to keep his daughter secured with a seat belt. After the officers approached Hawley's car, Mr. Hawley's daughter began to cry. The officers then spoke to her. Mr. Hawley contends that the officers were trying to indoctrinate his child with their own ideas of safety. The officers contend that they were trying to comfort her. In any case, John Hawley demanded that the officers stop talking to his daughter. At one point after Mr. Hawley had made the demand, Respondent Kendall spoke again to the child. Mr. Hawley became upset and began to shout at Officer Kendall. Kendall, believing himself in danger of physical assault, handcuffed Hawley, advising him that he was under arrest for disorderly conduct. Mr. Hawley was charged with violation of the child restraint (i.e., seat belt) law, Tex. Rev. Civ. Stat., art. 6701d §107C(c) (Vernon Supp. 1989), and disorderly conduct under Texas Penal Code, §42.01 (Vernon 1989). Mr. Hawley was incarcerated briefly upon his arrest, but he was not prosecuted

[1] The statement of facts is taken from the opinion of the court of appeals (Pet. App. A) and the memorandum order of the district court (Pet. App. B).

for the charges against him. Mr. Hawley filed suit against Respondents City of Dallas and Dallas police officers Kendall, Miller and Newsom alleging violations of his civil rights and various pendent state law claims.

The district court granted Respondent's motion for summary judgment as to the individual officers and to the City of Dallas holding that the officers were entitled to qualified immunity and holding that the City of Dallas could not be liable since no constitutional violation had occurred and since Petitioners had failed to demonstrate that any City of Dallas policy was the moving force of a constitutional violation. The court of appeals affirmed the district court's summary judgment.

ARGUMENT

The petition for writ of certiorari should be denied for the following reasons: (1) the only questions properly before the Court have already been decided by the Court's previous decisions; (2) the petition fails to present a substantial federal question; (3) the opinion below was accurate and correct and the right result was reached; and (4) no conflict exists among the circuits.

I. The Only Questions Properly Before the Court Have Already Been Decided By the Court's Previous Decisions.

The only questions properly before this Court are: (1) whether police officers sued for constitutional violations lose their qualified immunity because their conduct allegedly violates section 12.04 of the Texas Family Code,

and (2) whether a city may be held liable for an allegedly unconstitutional policy if no constitutional injury exists. No other questions were raised and resolved in the lower court, therefore, no questions, other than those set forth, are properly before the Court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976).[2]

Regarding the first question, Petitioners have focused on a provision of the Texas Family Code which sets out the rights, privileges, duties and powers a parent enjoys under Texas law. Petitioners allege that Respondent police officers violated that Texas statute when they

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[2] Although Petitioners alleged violations of the fourth, sixth, eighth, and fourteenth amendments in their complaint, Petitioners did not urge those arguments before the district court in Plaintiff's Response to Defendants' Motion to Dismiss or, Alternatively, Motion for Summary Judgment (Rec. Document No. 20, labeled "A") or before the court of appeals in their Brief for Appellants. The only mention of any of the amendments, other than mention made in petitioner's original complaint and in the petition for writ of certiorari, is a passing reference to the eighth amendment in Petitioner's brief before the court of appeals. (*See* Brief for Appellants, p. 17). The one passing reference to the eighth amendment was made in the context of Petitioner's argument that the City of Dallas should be liable to Petitioners for the city's unconstitutional policy. Even though the Petitioners may have tried to preserve this question, since the court of appeals did not resolve the question, there is no need for this Court to reach the question. The court of appeals never resolved the eighth amendment question because it found that no constitutional injury had been established. Since none of the questions concerning the fourth, sixth, eighth, and fourteenth amendments was raised by Petitioners and resolved by the lower court, none of those questions should be examined by this Court. *Youakim v. Miller*, at 234.

spoke to John Hawley's daughter over his objection. Assuming, for the sake of argument, that the officers violated the Texas statute, there still would be no reason for this Court to review the lower court's decisions granting the officers' qualified immunity. Police officers sued for constitutional violations do not lose their qualified immunity merely because their conduct allegedly violates some state statutory provisions. *Davis v. Scherer*, 468 U.S. 183, 194 (1984). Moreover, both the district court and the court of appeals concluded that Respondent police officers did not violate the Texas Family Code or any other clearly established state or federal law.[3] The lower courts concluded that no provision of the Texas Family Code required peace officers to cease speaking to minors upon parental request.

Regarding the second question, the Court has stated that municipalities should not be held liable for an allegedly unconstitutional policy if no constitutional injury exists. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). Both the district court and the court of appeals found that Petitioners failed to demonstrate the existence of a constitutional violation. In light of these findings, Petitioners' assertions regarding City of Dallas policy are of no significance.

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[3] Since Texas courts recognize the defense of qualified immunity for public officials in state law causes of action, *Dent v. City of Dallas*, 729 S.W.2d 114, 117 (Tex.Civ.App. – Dallas 1986, writ ref'd n.r.e.); *Anderson v. Higdon*, 695 S.W.2d 320, 324 (Tex.Civ.App. – Waco 1985, writ ref'd n.r.e.), the outcome of this case would be the same whether this case had been heard in state or federal court.

II. The Petition Fails to Present a Substantial Federal Question.

Petitioners fail to present any question of national significance worthy of the Court's review. No substantial federal question regarding the rights, privileges or immunities secured by the United States Constitution or laws is implicated by a police officer speaking to a minor child. Furthermore, a question regarding the interpretation of a Texas statute does not implicate national policy concerns and is best left to the Texas courts. It is not necessary or advisable for the Court to spend its time and energy exploring in detail the boundaries and applications of a provision of the Texas Family Code.

III. The Opinion Below Was Accurate and Correct and the Right Result Was Reached.

The petition for writ of certiorari should be denied because the opinion below was accurate and correct and the right result was reached. First, the lower court accepted as true for purposes of appeal Petitioners' assertion of the facts. Second, the lower courts applied the proper standard in determining the issue of municipal liability and Respondents' entitlement to qualified immunity. Both the district court and the court of appeals applied the legal standard enunciated in *Anderson v. Creighton*, 483 U.S. 635 (1987), that government officials are qualifiedly immune if a reasonable official could have believed his conduct was lawful in light of clearly established law and the information he possessed at the time he took the action about which Petitioners complain. The lower

courts also applied the proper standard concerning municipal liability by following dictates of *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

IV. No Conflict Exists Among the Circuits.

Finally, the petition for writ of certiorari should be denied because there is no conflict among the circuits on any issue Petitioners have properly placed before this Court. Petitioners refer to some general statements made by the Seventh, Eighth, Ninth and Tenth Circuits as well as statements made by this Court concerning the constitutionally protected relationship between a parent and child. In all cases cited, Petitioners fail to demonstrate how the Fifth Circuit differed from the other circuits on the issues of qualified immunity or municipal liability. Petitioners also fail to demonstrate how the Fifth Circuit is at odds with any other circuit on the question of police officers speaking to minor children without parental consent. Petitioners have simply failed to demonstrate a real conflict among the circuits on this issue.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Assistant City Attorney

April 1990